Criminal Law Issues In Immigration Proceedings: A Primer

Presented by John Crossett, Temporary Board Member October 18, 2018

LEARNING OBJECTIVES

- Understand the common immigration consequences of criminal convictions and the kinds of crimes which trigger such consequences.
- Understand what the term "conviction" means in immigration cases, and what it does not mean.
- Understand how a conviction can be proved in immigration proceedings.
- Understand how criminal-court action vacating or modifying convictions impacts immigration adjudications.
- Understand how actual and potential sentences are calculated in immigration cases.

IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

Removability

- Section 212(a)(2) of the Act Criminal Grounds of **Inadmissibility**
- Section 237(a)(2) of the Act Criminal Grounds of **Deportability**

Denial of Relief or Protection From Removal

- Some convictions are grounds for **mandatory** denial of relief
- Other convictions may be grounds for **discretionary** denial of relief

Detention

- Some convictions are grounds for **mandatory** detention without bond under section 236(c) of the Act
- Other convictions may be grounds for **discretionary** denial of bond if they reflect that the alien's release would pose a danger to the community.

CRIMES TRIGGERING IMMIGRATION CONSEQUENCES

Crimes Constituting Grounds of Inadmissibility <u>AND</u> Deportability

- Crimes Involving Moral Turpitude ("CIMTs")
 - Section 212(a)(2)(A)(i)(I) of the Act CIMT Ground of **Inadmissibility**
 - Section 237(a)(2)(A)(i) of the Act CIMT Ground of **Deportability**
- Controlled Substance Violations ("CSVs")
 - Section 212(a)(2)(A)(i)(II) of the Act CSV Ground of **Inadmissibility**
 - Section 237(a)(2)(B)(i) of the Act CSV Ground of **Deportability**
 - * CSVs trigger immigration consequences only if they involve FEDERALLY controlled substances.

CRIMES TRIGGERING IMMIGRATION CONSEQUENCES (CONT'D)

Crimes Constituting Grounds of Deportability ONLY

- Aggravated Felonies ("AGFELs")
 - Section 101(a)(43) of the Act defines more than 20 different categories of aggravated felonies
 - Section 237(a)(2)(A)(iii) of the Act AGFEL Ground of **Deportability**
- Crimes of Domestic Violence / Child Abuse
 - Section 237(a)(2)(E)(i) of the Act Domestic Violence and Child Abuse Ground of **Deportability**
- Firearm Offenses
 - Section 237(a)(2)(C) of the Act Firearm Ground of **Deportability**

"CONVICTION" DEFINED

Section 101(a)(48)(A) of the Act:

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court <u>or</u>, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

"FORMAL JUDGMENT OF GUILT"

Must be entered in "true criminal proceedings"

- Typically includes:
 - General courts-martial
 - Most municipal ordinance violations
- Typically does not include:
 - Juvenile delinquency adjudications

NOTE Adjudication of juvenile delinquency distinct from <u>juvenile</u> "conviction"



"FINALITY"

Matter of J.M. Acosta, 27 I&N Dec. 420 (BIA 2018)

- A conviction lacks "finality" until the right to a direct appeal has been exhausted or waived; however, finality is (rebuttably) presumed once the convicting jurisdiction's appeal filing deadline has passed.
- A conviction does not lack finality if it is the subject of:
 - (1) collateral review (e.g., habeas, coram nobis, etc.); or
 - (2) appellate review unrelated to the underlying merits (e.g., an appeal that challenges only a sentence).

"IF ADJUDICATION OF GUILT HAS BEEN WITHHELD"

Refers to rehabilitative/diversionary dispositions

Section 101(a)(48)(A) has 2 requirements:

 (i) Indicia of guilt, such as a guilty plea, nolo contendere plea, or admission of sufficient facts to warrant a finding of guilt

AND

(ii) Judicial imposition of punishment or "restraint on liberty"

DEFERRED ADJUDICATION --IMPOSITION OF PUNISHMENT

- Qualifying punishments, penalties, or restraints:
 - Incarceration, probation, monetary penalty (e.g., fine, restitution, court costs)
 - Open question:
 - Do sanctions such as mandatory drug treatment, anger management classes, community service, or suspension of driving privileges qualify as "punishments" or "restraints on liberty"?

PROVING EXISTENCE OF CONVICTION

CAVEAT The fact that a document may be used to prove the existence of a conviction does not mean that the document is part of the "record of conviction" used to show elements of a divisible offense



PROVING EXISTENCE OF CONVICTION (CONT'D)

R's formal **admission** of a conviction alleged in NTA is typically sufficient, w/o the need for additional evidence - 8 C.F.R. § 1240.10(c)

PROVING EXISTENCE OF CONVICTION (CONT'D)

- When conviction is **NOT** admitted, sections 240(c)(3)(B)-(C) of the Act and 8 C.F.R. §1003.41 list documents that can be used as proof
 - Copies of such documents must be authenticated, but method is flexible

Matter of J.R. Velasquez, 25 I&N Dec. 680 (BIA 2012)

EFFECT OF COLLATERAL ATTACK

- Pending collateral attack does NOT affect the validity of a "conviction" for immigration purposes
 - *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992)
- EOIR does not entertain collateral attacks on convictions in removal proceedings
 - Conviction subject to collateral attack generally remains viable absent evidence it was overturned, modified, or vacated

REHABILITATIVE VACATUR / MODIFICATION OF "CONVICTION"

Section 101(a)(48)(A) of the Act provides that a conviction vacated or modified for rehabilitative purposes **remains effective**.

• *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1998)

VACATUR FOR REASONS OTHER THAN REHABILITATION

- EOIR generally gives "full faith and credit" to judgments vacating/modifying convictions.
- **HOWEVER**, EOIR does **NOT** give full faith and credit to orders vacating convictions **solely** to ameliorate immigration hardships.
 - *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)

VACATUR DUE TO DEFECT



- *NOTE* There is a differencen between
 - Vacatur to ameliorate immigration hardships; and
 - Vacatur to correct failure to advise alien of immigration consequences of conviction.
 - *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006)
 - *Padilla v. Kentucky*, 559 U.S. 356 (2010)

PARDONS

 As a rule, convictions remain effective for immigration purposes despite having been pardoned.

MAJOR EXCEPTION:

Section 237(a)(2)(A)(vi) of the Act provides that certain pardoned convictions cannot support **deportability** charges as CIMTs or AGFELs

PARDONS (CONT'D)

CAVEATS

- Pardoned conviction is still basis for inadmissibility charges, and for deportability charges arising under grounds other than CIMT and AGFEL
- Pardon must be "full and unconditional"
- O Pardon must be "executively" conferred "legislative" or "judicial" pardons do not count

"SENTENCE" UNDER THE ACT

Sentencing issues arise in THREE contexts:

- (1) When an immigration consequence depends upon the amount of time the respondent spent in criminal custody.
 - Section 101(f)(7) of the Act, which precludes an alien from demonstrating that he has been a person of "good moral character" during any period in which he "has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more."

"SENTENCE" UNDER THE ACT

- (2) When an immigration consequence depends upon the term of imprisonment **ordered** by a court.
 - Section 101(a)(43)(F) of the Act, which defines the term "aggravated felony" to mean a crime of violence "for which the term of imprisonment [is] at least one year."

SUSPENDED SENTENCES

Section 101(a)(48)(B) of the Act:

"Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."

• Thus, the term of imprisonment **ordered** by the court controls even if the defendant never **served** a day in prison.

INDETERMINATE SENTENCES

A sentence to an indefinite term of imprisonment is treated as a sentence for the **maximum** permissible term

• Example: term "not to exceed 5 years" is deemed a sentence to 5 years. *Matter of S-S-*, 21 I&N Dec. 900 (BIA 1997).

INCARCERATION AS CONDITION OF PROBATION

- "Term of Imprisonment" includes incarceration imposed as condition of probation or upon revocation of:
 - o Probation;
 - o Parole; or
 - Supervised release

Matter of Perez Ramirez, 25 I&N Dec. 203 (BIA 2010)

"SENTENCE" UNDER THE ACT

- (3) When an immigration consequence depends upon the maximum term of imprisonment that **could have been imposed** by a court.
 - Section 237(a)(2)(A)(i), which covers certain crimes involving moral turpitude "for which a sentence of one year or longer may be imposed."

VACATUR/MODIFICATION OF "SENTENCE"

- Vacatur / modification of sentence is given effect regardless of the court's reason
 - Modification given effect even if rehabilitative or to ameliorate immigration hardship
 - Different from vacatur / modification rule for "convictions."

Matter of Cota, 23 I&N Dec. 849 (BIA 2005)

CRIMINAL GROUNDS NOT REQUIRING "CONVICTION"

- Section 212(a)(2)(A)(i)—CIMT or CS offense
 - Alien who "admits" committing a crime involving moral turpitude or a controlled substance violation
- Section 212(a)(2)(C)—illicit drug trafficking
 - Alien who the Attorney General knows or has "reason to believe" is an illicit drug trafficker

CONCLUSION

- Recognize common immigration consequences of convictions
- "Conviction" is defined in section 101(a)(48)(A)
- How conviction is proven in immigration proceedings
- How to deal with the vacatur / expungement / modification of convictions
- How to calculate sentences, when relevant
- Recognize that some criminal removal grounds do not require convictions

BREAK

Criminal Law Issues in Immigration Proceedings: The Categorical Approach and Divisibility

Presented by John Crossett, Temporary Board Member October 18, 2018

Important Caveats

Categorical approach does **NOT APPLY**:

- To grounds of removal that do not require a conviction.
- Where the ground of removal references the "particular circumstances" in which the generic offense is committed.

What is the Categorical Approach?

A method of comparing:

- (1) a real crime (the "predicate offense") to
- (2) a *hypothetical* crime listed in a federal statute (the "generic offense"),
- (3) using the "elements" of the predicate offense as the unit of comparison.

Elements-Based Offenses

The generic offense:

- (1) is a named crime with traditional elements (e.g., "murder, "rape," "burglary offense," "theft offense," "conspiracy"), or
- (2) is a crime involving moral turpitude (although the CIMT concept is broadly defined, in practice the "reprehensibility" of a crime often depends upon the presence of certain key "elements.")
- (3) cross-references federal statute (e.g., "an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments)").
 - The generic offense is defined by the <u>elements</u> of the crossreferenced statute.

Elements-Based Offenses

When confronted with an elements-based offense, ask:

 Do the elements of the predicate offense correspond to the elements of the generic offense?

Hypo

A state theft statute requires proof of these elements:

- (1) a taking of property, (2) w/o owner's consent, and
 - (3) w/ intent to deprive the owner of her property.

Generic theft is defined as:

• (1) a taking of or exercise of control over property, (2) w/o the owner's consent, and (3) w/ intent to deprive the owner of the rights and benefits of ownership, either permanently or temporarily.

Does the state theft statute define a categorical "theft offense"?

Hypo

A state theft statute requires proof of these elements:

• (1) a taking or appropriation of property, (2) by means of conversion or fraud.

Generic theft is defined as:

• (1) a taking of or exercise of control over property, (2) w/o the owner's consent, and (3) w/ intent to deprive the owner of the rights and benefits of ownership, either permanently or temporarily.

Does the state theft statute define a categorical "theft offense"?

Broadly Descriptive Offenses

The generic offense describes a broad class of offenses sharing common characteristics

• E.g., "sexual abuse of a minor"; "crimes of violence" under 18 U.S.C. § 16(a); "crimes of child abuse"; offenses "relating to" traditional crimes (e.g., "relating to ... forgery" or "relating to perjury").

Broadly Descriptive Offenses

When confronted with a broadly descriptive offense, ask:

- Does the predicate offense, as defined by its elements, necessarily have <u>all</u> the characteristics associated with the generic class of offense?
- Look to the <u>least of the acts criminalized</u> by the predicate offense in making this determination.

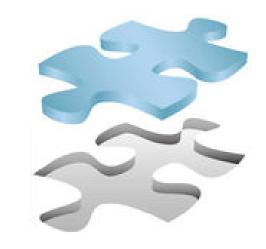
Hypo

A state assault statute requires proof of these elements:

- The accused "knowingly acts in a manner likely to be injurious to the physical, mental, or moral welfare of a person under 16 years old."
- Categorical match for a "crime of child abuse"?
- Under *Matter of Velazquez-Herrera*, a generic "crime of child abuse" covers "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation."

Categorical Match

If the elements of the predicate offense <u>all</u> fit within the definition of the generic offense the predicate offense is a "categorical match" for the generic offense.



Ask: does it fit?

Realistic Probability Test

- Where R argues statute reaches conduct outside the definition of the generic offense, ask:
 - ➤ Is there a <u>realistic probability</u>, NOT just a theoretical possibility, that the statute would be applied to conduct outside the definition of the generic offense?

Realistic Probability Test

- It is <u>R's BOP</u> to show that the statute has been used to prosecute conduct outside the generic offense.
 - ➤ Point to his own case, or
 - Any other case where state applied statute in non-generic manner.

Categorical Mismatch?



Descamps v. United States, 133 S. Ct. 2276 (2013)

Descamps v. United States, 133 S. Ct. 2276 (2013)

• A modified categorical inquiry is impermissible unless the offense of conviction is "divisible."

• An offense is not divisible merely because it is broader than the generic immigration crime.

An offense is "divisible" only if:

- (1) It is defined in the alternative;
- (2) At least one alternative, but not all, categorically matches the generic immigration crime; AND
- (3) Each alternative defines a distinct offense "element."

An offense is "defined in the alternative" under *Mathis* if it contains:

- (1) Multiple numbered subparts; and/or
- (2) Disjunctive phrases; and/or
- (3) Terms of art that are defined disjunctively in other sections; and/or
 - (4) Variable sentencing provisions.

Tex. Penal Code § 22.01. Assault

- (a) A person commits an offense if the person:
- (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
- (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
- (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
- (b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:
- (1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant....

Tex. Penal Code § 1.07(8)

"Bodily injury" means physical pain, illness, or any impairment of physical condition

An offense also *may* be defined in the alternative under *Mathis* if it:

- (1) Has a disjunctive "common law" definition.
 - E.g., United States v. Redrick, 841 F.3d 478 (D.C. Cir. 2016) (Maryland robbery)
- (2) Is a general inchoate offense (attempt, conspiracy, solicitation) or requires the commission of other offenses.
 - E.g., Franco-Casasola v. Holder, 773 F.3d 33 (5th Cir. 2014) (18 U.S.C. § 554)

At least one alternative, <u>but not all</u>, categorically matches the generic immigration crime.

- If <u>all</u> alternatives match, then a modified categorical inquiry is unnecessary.
- If <u>none</u> of the alternatives matches, then a modified categorical inquiry is impermissible.

Each alternative statutory subpart or term must define a distinct offense "element," rather than a mere "brute fact" or "means" of satisfying a broad element.

"Elements" are facts about a crime that a jury must find, unanimously and beyond a reasonable doubt, in order to render a lawful guilty verdict.

Descamps v. United States, 133 S. Ct. 2276, 2288 (2013)

"Brute facts," by contrast, are "mere real-world things" they have no legal consequence and need neither be found by a jury nor admitted by a defendant.

Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)

How to distinguish "elements" from "brute facts"

- (1) *Statutory text* if statutory alternatives are listed as "illustrative examples," then they are NOT elements. Be on the lookout for the words "includes" or "including."
 - *E.g., United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir. 2013) ("Sexual abuse' includes, but is not limited to … [i]ncest, rape, or sexual offense in any degree").

How to distinguish "elements" from "brute facts"

- (2) *Case law* from the convicting jurisdiction Be on the lookout for state cases discussing...
 - Schad v. Arizona, 501 U.S. 624 (1991)
 - Richardson v. United States, 526 U.S. 813 (1999).

How to distinguish "elements" from "brute facts"

(3) Sentencing Provisions — any fact (other than a prior conviction) that increases the basic penalty that may be imposed for an offense is an "element" that must be proven to the jury beyond a reasonable doubt.

• Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)

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- (1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty....

How to distinguish "elements" from "brute facts"

(4) "Peeking" at the conviction record –

This "peek" is <u>not</u> a modified categorical inquiry; the conviction record—especially the charging document—is considered <u>only</u> to shed light on whether statutory alternatives are "elements."

- If the charging document lists <u>all</u> statutory alternatives, or <u>none</u>, then the alternatives <u>cannot</u> be elements.
- If the charging document lists <u>one</u> statutory alternative to the exclusion of the others, then the alternatives <u>may</u> be elements.

How to distinguish "elements" from "brute facts"

(5) *Model Jury Instructions* –

Although model jury instructions can be useful, they are not "law" and they can be variable in their reliability, so treat them with caution. *Mathis* did <u>not</u> discuss them as a potential source of information about resolving the "elements" versus "brute facts" distinction.

The Record of Conviction

• If the statute of conviction is divisible, look to the record of conviction to determine which part of the statute R was convicted of violating. The record of

conviction includes:

- Judgment of conviction
- Charging document
- Jury instructions
- Written, signed plea agreement
- > Transcript of plea colloquy
- Factual findings by trial judge
- ➤ Any comparable judicial records